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No. 85-1429

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

AMERICAN GENERAL LIFE AND ACCIDENT INSURANCE COMPANY,

Appellant,

v.

CAROLYN MILLER AND MARVIN RAMSEY MILLER, SR.,

Appellees.

On Appeal From The Supreme Court of Mississippi

REPLY MEMORANDUM

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REPLY MEMORANDUM

INTRODUCTION

Appellees' Motion to Dismiss ("Motion") advances arguments which were generally anticipated and addressed in appellant's Jurisdictional Statement ("Juris. Stat."). Accordingly, this Reply will correct various mischaracterizations and unwarranted inferences by appellees concerning the facts of record and Mississippi law and practice regarding the proper presentation of federal questions.

In their Motion, appellees concede, as they must in light of this Court's recent opinion in *Aetna Life Insurance Co.* v. *Lavoie*, No. 84-1601 (April 22, 1986), that the federal constitutional questions presented in this appeal are substantial. As this court stated in *Aetna*, the questions presented in this case—the unconstitutionality of the punitive damage award under the Excessive Fines Clause of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment, and the unconstitutionality of Mississippi's mandatory appeal penalty statute under the Equal Protection Clause—"raise important issues which, in an appropriate setting, must be resolved . . . ." *Id.*, slip op., at 14.[1]

Instead, appellees argue that neither of the federal questions presented in this appeal were properly presented to the court below. These arguments both distort Mississippi law and practice and ignore or misstate the relevance of clear contrary precedent in this Court.

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[1] Appellees' "Statement of the Case" consumes nearly five pages with "facts" drawn for the most part not from the record but a library book and a portion of the opinion of the Supreme Court of Mississippi, both of which speculate on the possibilities for unethical practice in the insurance industry generally. The rather transparent emotional appeal and conjecture about appellant's motives and procedures in the conduct of its business from outside the record are irrelevant to the question of this Court's jurisdiction.

1. Presentation of the Federal Constitutional Challenge to the Punitive Damage Award

Appellees do not dispute that in post-trial motions and on direct appeal to the Supreme Court of Mississippi, Juris. Stat., at 8, appellant squarely challenged the excessiveness of the $350,000 punitive damage award. Nor do appellees contend that the "excessiveness" argument advanced again at the rehearing stage was somehow a "different" argument simply because at that stage appellant specifically relied upon the Eighth and Fourteenth Amendments in support of its "excessiveness" argument. Thus, appellees do not dispute that *Dewey* v. *Des Moines*, 173 U.S. 193 (1899), is controlling on the question of this Court's power to decide this question in this case.

Appellees presumably do not challenge appellant's reliance on *Dewey* because, even if the excessiveness challenge had not been raised post-trial and on direct appeal, it is clear that it could have been raised for the first time in the Supreme Court of Mississippi by post-affirmance motion and, under this Court's holding in *Hathorn* v. *Lovorn*, 457 U.S. 255 (1982), would still be regarded as having been properly presented as regards this Court's jurisdiction.

In *Hathorn*, this Court considered and rejected the argument that a question raised for the first time by the petitioner at the rehearing stage and not addressed in the decision of the Supreme Court of Mississippi must be regarded as having been improperly presented. This Court, assuming that the denial of the petition for rehearing without comment could have constituted a decision that the presentation of that federal question came too late, nevertheless concluded that that federal question had been properly presented. This holding was based on the fact that the Supreme Court of Mississippi either has no rule against presentation of new federal questions at the rehearing stage or that, if it does, that rule was not "strictly or

regularly" followed, *Barr* v. *City of Columbia*, 378 U.S. 146, 149 (1964), so as to provide a basis for depriving this Court of its power to review a substantial federal question. *Hathorn* v. *Lovorn*, 457 U.S., at 263. This Court concluded in *Hathorn* that the denial of rehearing in that case "must have rested either upon a substantive rejection of petitioners' federal claim or upon a procedural rule that the state court applies only irregularly." *Id.*, at 264-65 (footnote omitted).

In its opinion in *Hathorn*, this Court examined a number of cases in which the court below decided questions which had been raised for the first time at the rehearing stage. *Id.*, at 263-64 & n.14. Appellees do not even suggest that the court below has departed from its practice of entertaining and deciding questions raised for the first time at the rehearing stage. Instead, appellees make the facile argument that this substantial federal question cannot be considered by this Court because this federal question was not, as allegedly required by Rule 14 of the court below, "distinctly set forth" in appellant's Petition for Rehearing. Thus, appellees urge that this Court must assume that this question could not have been entertained by the court below.[2]

On November 26, 1985, appellant filed a "Petition for Rehearing" in which it set forth, in five numbered sentences, its grounds for seeking a rehearing. J.S. App., at 26a. Those five numbered sentences were taken verbatim from the five headings found in appellant's Brief in Sup-

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[2] In advancing this argument regarding the alleged deficiencies in appellant's petition, appellees conveniently ignore the fact that, without regard to the petition itself, the excessiveness of the punitive damage award had already been expressly challenged on direct appeal to the Supreme Court of Mississippi. Juris. Stat., at 109a-110a. Appellees cannot escape the fact that the excessiveness of the punitive damage award has been hotly contested from the time that award was made by the jury.

port of Petition for Rehearing filed that same day. J.S. App., at 30a, 32a, 33a, 34a and 35a. It is the apparent position of appellees that the language chosen by appellant to capture the essence of its challenge to the excessiveness of the punitive damage award set forth under heading "A" in its Brief in Support of Petition for Rehearing, J.S. App., at 30a, was either inartful or otherwise deficient. In support of this transparently frivolous argument, appellees cite no case interpreting Rule 14, much less a case holding, or even remotely suggesting, that the words "briefly and distinctly set forth the grounds" in Rule 14 require lawyers practicing in Mississippi to select a particular combination of words by which to describe the bases on which they seek rehearing. Nor do appellees cite a single case in the court below suggesting that failure to choose the "right" words in a Petition for Rehearing—even assuming such a choice were required by Rule 14 and even if appellant could be thought to have selected the "wrong" words—could ever deprive the court below of its power to entertain and decide issues identified more fully and briefed in the required accompanying brief in support of that petition. Nor do appellees attempt to articulate any substantial, or even insubstantial, state purpose which might be served by the issuance of a rule which would achieve the result urged by appellees.[3] Rule 14 does not achieve such a result in this case, nor has it ever led to such a result in any reported or unreported case of the court below brought to this Court's attention by appellees or known to appellant.

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[3] Mississippi, like most other States, has largely abandoned highly technical rules of pleading. Rule 33 of the rules of that court expressly provides that the "design [of the Rules] is to facilitate business and advance justice . . . ." The interpretation placed on Rule 14 by appellees on the facts here would do neither.

2. Presentation of the Federal Constitutional Challenge to Miss. Code Ann. § 11-3-23 (Supp. 1982)

As discussed above, this Court has squarely determined that the Supreme Court of Mississippi has no practice of refusing to entertain questions presented for the first time at the rehearing stage. *Hathorn* v. *Lovorn*, 457 U.S., at 263-65. Indeed, if that court has a "strictly or regularly" followed practice, it appears to be to consider and resolve issues presented for the first time in petitions for rehearing. *Id.*, at 263 n.14.[4] *Hathorn* would thus appear to be dispositive of appellees' contention that appellant's challenge to the constitutionality of Mississippi's appeal penalty statute had to be raised on direct appeal before the judgment was affirmed by the court below.

Passing this point, appellees do not, because they cannot, cite a single case in the court below which suggests that a question involving § 11-3-23 is not timely presented at the rehearing stage.

Since at least 1882, the Supreme Court of Mississippi has recognized that questions regarding the implementation of § 11-3-23 and its predecessor statutes are appropriately raised by way of a post-affirmance motion in that court. *Tigner* v. *McGehee*, 60 Miss. 242 (1882). The court below entertained and rejected in post-affirmance proceedings an identical federal constitutional challenge to § 11-3-23 in *Wallace* v. *Jones*, 360 So.2d 932 (Miss. 1978). No case in the court below suggests that this challenge to §11-3-23 was not timely presented as a matter of state law. The same is true in every other court which has been

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[4] The holding in *Hathorn* that no Mississippi procedural bar could be invoked to preclude this Court's jurisdiction is in no way qualified, in the opinion of Justice O'Connor for the Court, by the several meaningless distinctions appellees attempt to draw, Motion, at 7 n.4. The holding of *Hathorn* is that the Supreme Court of Mississippi does not itself regularly invoke such a procedural bar on any sufficiently regular basis, if indeed such a bar even exists.

called upon to apply § 11-3-23 or its Alabama counterpart, § 12-22-72, *Code of Alabama* (1975).[5] Thus, the failure of the court below expressly to rule on this federal constitutional challenge to § 11-3-23 in no way undermines this Court's appellate jurisdiction over this case. *See Illinois* v. *Gates*, 462 U.S. 213, 220 n.2 (1983).

Appellees' reliance on *Collins* v. *North Mississippi Savings and Loan Association*, 445 So.2d 828 (Miss. 1984), is misplaced. In that case, the Supreme Court of Mississippi affirmed a decree below which had dismissed a complaint alleging that an appeal had been taken in bad faith. Section 11-3-23 was not put in issue, and the court below enunciated no rule concerning the proper time for challenging the application of that statute.

The other cases cited by appellees are equally irrelevant to and unsupportive of their argument. None of those cases appears to have involved any challenge, on appeal or post-

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[5] Although the question when a challenge to § 11-3-23 must be raised in order to be considered by the court below is technically an issue of Mississippi law, appellant's assertion that such a challenge should be raised by post-affirmance motion is not only not contradicted by any case in the court below but is also recognized as appropriate by the only other court which has been called upon to apply § 11-3-23. Thus, the Fifth Circuit has entertained and decided in post-affirmance proceedings various questions arising out of application of § 11-3-23 to diversity cases coming to it on appeal from the federal district court in Mississippi. *See, e.g., Affholder, Inc.* v. *Southern Rock, Inc.*, 746 F.2d 305 (5th Cir. 1984) (on motion to assess damages for appeal; motion denied); *Walters* v. *Inexco Oil Co.*, 725 F.2d 1014 (5th Cir. 1984) (post-affirmance motion in district court to assess penalty; motion granted).

The same understanding also governs with respect to challenges to Alabama's virtually identical appeal penalty statute, § 12-22-72, *Code of Alabama* (1975), in both the Alabama courts, *see, e.g., Central of Georgia Railway Co.* v. *Steed*, 287 Ala. 64, 248 So.2d 110 (1971) (federal constitutional challenge in post-affirmance proceedings to § 12-22-72 decided against the challenge), and in the Eleventh Circuit, *Burlington Northern R. Co.* v. *Woods*, No. 85-1088 (*cert. granted*, March 24, 1986) (post-affirmance federal constitutional challenge denied *sub silentio*).

appeal, to the imposition of a penalty under § 11-3-23.[6] Even if these cases said what appellees contend they say—namely, that an appropriate "technique" to contest the imposition of the appeal penalty is on direct appeal—*at most* they would stand for the proposition that an appellant *may* elect to challenge the potential application of the appeal penalty statute prior to its actual imposition. Appellees do not point to a single line in any of these cases suggesting that an appellant *must* challenge the applicability of § 11-3-23 on direct appeal in order to be heard.

Neither can appellees summarily dispose of *Wallace* v. *Jones* on the ground that the federal constitutional challenge was raised by the appellant only after the appellee had sought to have the appeal penalty imposed. Motion,

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[6] *Cunningham* v. *Cunningham*, 423 So.2d 136 (Miss. 1982), for example, appears to have involved a request by the appellee for imposition of a penalty on appeal of a case from the county (trial) court to the circuit court. Because the Supreme Court of Mississippi found that no appeal was effectively taken below, much less affirmed, § 11-3-23 did not authorize statutory damages. There is no suggestion that appellee had raised the issue of the penalty at the time of the original appeal in anticipation that appellant would be unsuccessful.

In *South Central Bell Telephone Co.* v. *Aden*, 474 So.2d 584 (Miss. 1985), a workers' compensation case, the Supreme Court of Mississippi affirmed an order of the Workers' Compensation Commission. The court did impose a penalty pursuant to § 11-3-23, but there is nothing whatsoever in the opinion to suggest that it did so upon the request of the appellee, or that appellant challenged the application of the statute on its appeal. Rather, the court appeared to be implementing § 11-3-23 *sua sponte* as a natural consequence of the decision to affirm. 474 So.2d, at 598.

Similarly, while the Supreme Court of Mississippi imposed a penalty under § 11-3-23 in *Lumbermens Mutual Casualty Co.* v. *Rhodes*, 459 So.2d 244 (Miss. 1984), it also appears to have done so on its own motion as a consequence of the decision to affirm the judgment of the lower court in a garnishment proceeding. There is absolutely no suggestion in the opinion that the applicability or non-applicability of the statute was raised by either of the parties on appeal.

at 7-9. Appellees understandably do not suggest what state purpose might be advanced by such a rule, because there would be no purpose other than to require all litigants to brief every conceivable question regarding § 11-3-23 on direct appeal of cases in which that statute might have some possible application.

CONCLUSION

The jurisdiction of this Court over this case is well established by decisions of this Court and the court below. This case should be held for consideration together with the appeals in *Bankers Life and Casualty Company* v. *Crenshaw*, No. 85-1765, and *Treadwell Ford, Inc.* v. *Campbell*, A-749.[7]

May 1, 1986

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[7] *Bankers Life* presents both of the questions presented in this appeal and would also permit the Court to address the question whether the retrospective application of a newly formulated substantive rule of law violates the Contract Clause and Due Process Clause of the Fourteenth Amendment. *Treadwell Ford, Inc.* presents an Eighth and Fourteenth Amendment challenge to a punitive damage award pursuant to an Alabama statute interpreted by the Alabama courts to authorize punitive damages, as well as a challenge to Alabama's appeal penalty statute, § 12-22-72, *Code of Alabama* (1975). The Court may want to consider setting *Bankers Life* and *Treadwell Ford, Inc.* for argument in tandem in order to present the broadest range of considerations raised by these cases. Should the Court do so, this case should be held pending disposition of *Bankers Life* and *Treadwell Ford, Inc.*

Respectfully submitted

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